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Control Conflicts between Copyright, Privacy and Personal Data Protection: How well are "John and Jane Doe" protected?

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Control Conflicts between Copyright, Privacy and Personal Data Protection: *how well are "John and Jane Doe" protected?*

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Privacy, confidentiality, personal data protection & copyright

Privacy - is perhaps better understood as "the state of being let alone" [in line with OED early definition] since the classic "right to be let alone" imports such normative, if not legal, baggage. Legal protection in Canada variable.

Personal data protection - although clearly purposefully related to privacy, also concerns encouraging data transfer (OECD Guidelines purpose section), and, moreover, has been constructed in Canada, as elsewhere, as administrative regimes that create statutory confidentiality, albeit in a very restricted subject matter: personal data. Many Canadian businesses, including ISPs, governed by PIPEDA.

Confidentiality -- embraces a wider subject matter than just personal data-- and analytically and philosophically differs from privacy: Kim Scheppele (Chicago, 1988), Elizabeth Neill (UWO, 2001). Often dealt with by contract.

Copyright infringement enforcement: Copyright Act, ss.35 & 38.1

Considering the roles and responsibilities of ISPs:

- ***Society of Composers, Authors and Music Publishers of Canada [SOCAN] v Canadian Association of Internet Providers*, 2004 SCC 45, [2004] 2 SCR 427 ["Tariff 22" decision], per LeBel, J.**

- ***BMG Canada Inc v John Doe*, 2005 FCA 193, [2005] 4 FCR 81, Sexton, J., for the Court**

  See Margaret Ann Wilkinson, "Battleground between New and Old Orders: Control Conflicts between Copyright and Personal Data Protection," in Ysolde Gendreau (ed.) *Emerging Intellectual Property Paradigm -- Perspectives from Canada* (Cheltenham (UK): Edward Elgar, 2008), 227-266.

- **Ontario developments:**
  - ***Warman v Fournier et al* 2010 ONSC 2126 (Ont Div Ct)** [Charter-like concerns, not PIPEDA; production from a party, not a third party, sought and denied]
  - **But *1654776 Ont. Ltd v Stewart*, 2013 ONCA 184 (ONCA) overrules *Warman* in favour of *BMG* approach…**

- ***Voltage Pictures LLC v John Doe and Jane Doe*, 2014 FC 161(Aalto (Prothonotary))**

In the 2004 "Tariff 22" Supreme Court case the Majority did not look at privacy, but Justice LeBel*, dissenting in part, did:

"[In concurring with the majority in part] Insofar as is possible, this Court should adopt an interpretation … that respects end users' privacy interests, and should eschew an interpretation that would encourage the monitoring or collection of personal data gleaned from Internet-related activity within the home…"

"[In dissenting from the test adopted by the majority in "Tariff 22"], insofar as it looks at the retrieval patterns of end users, encourages the monitoring of an individual's surfing and downloading activities. Such habits tend to reveal core biographical information about a person. Privacy interests of individuals will be directly implicated where owners of copyrighted works or their collective societies attempt to retrieve data from Internet Service Providers about an end user's downloading of copyrighted works. We should therefore be wary of adopting a test that may encourage such monitoring."

*** Retiring from the Court November 30 (at mandatory 75).**

Nonetheless, Binnie J, for the Majority, not considering privacy, did write, of ISPs:

"It is clear that Parliament did not want copyright disputes between creators and users to be visited on the heads of Internet intermediaries, whose continued expansion and development is considered vital to national economic growth."

(in holding that the music collective SOCAN cannot have a tariff imposed upon ISPs)

(Justice Binnie left the Supreme Court in 2011.)

BMG v. John Doe – FCA 2005

Sexton, J, for himself and Noel, J, and Richard, CJ, May 19, 2005, on appeal from the judgment of Justice Finckenstein, March 31, 2004:

> **"Modern technology … must not be allowed to obliterate those personal property rights which society has deemed important. Although privacy concerns must also be considered, it seems to me that they must yield to public concerns for the protection of intellectual property rights in situations where infringement threatens to erode those rights."**

The Supreme Court "Tariff 22" decision was not discussed (nor was it discussed in the 2014 *Voltage Pictures* case).

Two different contexts of "privacy" in *BMG v. John Doe* (2005) and again in *Voltage Pictures* (2014):

OLD

- **"the legitimate privacy concerns"**
- **referred to in the 5th branch of the test for granting equitable bills of discovery –**
- **Which, in *BMG*, the FCA found were the 5 tests to be applied in determining discovery under Federal Court Rule 238;**
- **Approach continued in 2014 *Voltage Pictures***

NEW

PIPEDA – came into force for ISPs on January 1, 2004 –

- **except in Quebec, first PRIVATE sector personal data protection in Canada**
- **2 months before the lower court decision in *BMG v John Doe***
- **acknowledged in *BMG* by Justice Finckenstein and then FCA – BUT, I have argued, not properly incorporated**
- **quoted in *Voltage Pictures*, but, again, not actually used in the decision**

Note actual outcome in *BMG* FCA:

The FCA dismissed the appeal – thus the applicants did not get the order against the ISPs requiring that they disclose the identities of the 29 users -- BUT

even Justice Sexton describes the outcome as a "divided success" –

the dismissal was "without prejudice to the plaintiff's right to commence a further application for disclosure of the identity of the [users]"…

The loss turned on the FCA's view that much of the affidavit evidence presented was hearsay and (as Justice Finckenstein had also worried in the lower Federal Court) too much time had passed between the gathering of the evidence to support the motion and the decision and that the identities of those holding the accounts, who had been using the pseudonyms, might have changed in the interval and thus the fifth branch of the test was not met – but only in the proceeding before them.

BMG on privacy, personal data protection and copyright:

- **The FCA decision on the first factor, the *bona fide* claim, was that the test is only whether the APPLICANT PLAINTIFFS "really do intend to bring an action for infringement of copyright based upon information they obtain, and that there is no improper purpose for seeking the identity of these persons."**
  - This test is so low that there is no real opportunity, in ISP cases, to argue about whether the defendant users would have defences such as fair dealing or private copying available to them…
  - But, the gist of my argument against the reasoning(but not the result) of the *BMG* FCA decision, lies with the 5th step of the test for this type of order against "third parties" (in this case the ISPs) that the FCA endorsed (the order is often called a "Norwich order")

- **TEST FACTOR 5:**

  The FCA said public interests in favour of disclosure must outweigh the legitimate privacy concerns.

Sexton, writing *BMG* FCA judgment, juxtaposed privacy and intellectual property and, in doing so, oversimplified the notion of privacy:

- **All cases cited by Sexton were decided prior to the implementation of PIPEDA (January 1, 2004)**
- **In Canada, there has been a real confusion, certainly popularly, and even amongst scholars, between personal data protection and privacy.**
- **Personal data protection had come to govern much of the public sector since 1977 – but always as a companion to access legislation.**
- **PIPEDA is ONLY personal data protection legislation: there is no balancing legislated right of access to data in the private sector.**
- **Sexton cited *Glaxo Wellcome v. Revenue Canada* as authority for priorizing disclosure; but that case stands for the proposition that a litigant seeking production of documents from a public sector institution need not apply under access legislation but can, instead, seek a court order for production: obviously the balances should be different where no access legislation is involved. This confusion about *Glaxo Wellcome* and the fact that it is not a personal data protection case continued in the *Stewart* case in the ONCA overruling the Divisional Court's *Warman v Fournier* approach.**

I argue that Factor 5 should be satisfied with reference to PIPEDA in cases such as these:

Whether the public interests in favour of disclosure must outweigh the legitimate privacy concerns…

This is precisely the point of PIPEDA in the private sector:

"to establish rules [for organizations engaged in commercial activities]… in a manner that recognizes the right of privacy of individuals with respect to their personal information… and the need of [such] organizations [for] personal information for purposes that a reasonable person would consider appropriate." (s.3)

While, as the cases accept (of course the users were not parties to the motions, although some are the targetted defendants), a custodial organization must, under PIPEDA, disclose information only under a court order, the entire thrust of the legislation is against disclosure of personal data held by private organizations.

Factor 5: The public interests in favour of disclosure must outweigh the legitimate privacy concerns.

Justice Sexton's reasoning in *BMG* was circular:

"Privacy rights are significant and they must be protected. In order to achieve the appropriate balance between privacy rights and the public interest in favour of disclosure, PIPEDA [permits disclosure if there is a court order and that provision of PIPEDA is to be used to determine whether there should be a court order]."

Prothonotary Aalto found himself bound by the previous decision of his higher court, the FCA…

PIPEDA legislates those interests in disclosure that transcend personal data protection:

inter alia-

to a government institution for purposes of

- **National defence or security**
- **Conduct of international affairs**
- **Enforcing or administering laws…**

Nowhere are the interests of private litigants or IP rights holders placed ahead of personal data protection.

What are the dangers of the Federal Court of Appeal's approach?

ISPs could be ordered to reveal the identities of users in any case where a plaintiff can show a bona fide rather than prima facie interest in pursuing litigation:

- **Divorce**
- **Debtor creditor**

No qualitative difference under Rule 238 between civil intellectual property claims and any other claim.

PIPEDA is rendered unstable, to say the least, in the context of businesses being conducted on the internet.

Would the plaintiffs be left without a remedy if PIPEDA actually governed disclosure in such a case?

Qualified releases such as those contemplated by Justice Sexton and Prothonotary Aalto are not possible under PIPEDA – the information is either released or not released, whereas Justice Sexton suggested orders for use of initials to identify the parties in litigation proceedings or use of a confidentiality order to keep the proceedings confined to the parties and Prothonotary Aalto uses the Case Management system to maintain oversight on plaintiff.

But, under strict PIPEDA, if the identities of the alleged defendants come to the plaintiffs' attention *from any source other than the ISPs*, there is nothing to prevent the plaintiffs from launching their civil infringement actions.

Or, if *criminal* proceedings are contemplated against these users, the discovery process is decided under other rules and, should it be relevant, the public interest is more clearly discerned than in disputes between private litigants.

Where records are involved, personal data protection governs --

As agreed by the parties to the contracts (user agreements) involved, users share confidential information with their ISPs:

– these confidences form the subject matter of records which are the subject of legislated personal data protection, in this case, under PIPEDA,

-- the legislation already makes the trade off between privacy values and data sharing values for those organizations subject to it (including ISPs),

-- therefore, on an application for discovery such as was before the Fed Ct and then FCA in *BMG v. John* Doe and Fed Ct *in Voltage Pictures v John Doe and Jane Doe*, the question of the public interest, set out as part 5 of the test for discovery, must, I argue, be answered by the courts as the legislature has answered it in the relevant personal data protection regime, in this case PIPEDA.

Thank you…